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No. 99-658

In the Supreme Court of the United States

JAIME CASTILLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the type of firearm used or carried by an offender during and in relation to a predicate offense was a sentencing factor, rather than an element of the offense, under the version of 18 U.S.C. 924(c)(1) in effect at the time of petitioners' offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 144a-162a) is reported at 179 F.3d 321. An earlier opinion of that court (Pet. App. 1a-116a), affirming petitioners' convictions and remanding for resentencing on one count, is reported at 91 F.3d 699. The opinions of the district court on remand (Pet. App. 165a-169a) and in connection with the original sentencing (Pet. App. 119a-141a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Petitions for rehearing were denied on July 28, 1999 (Pet. App. 163a-164a). The petition for a writ of certiorari was filed on October 15, 1999, and

granted on January 14, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 18 U.S.C. 921 and 924(c) (1988 & Supp. V 1993), 26 U.S.C. 5845(b), and the current version of Section 924(c) are reprinted at App., *infra*, 1a-6a.

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, each petitioner was convicted of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1993).[1] Petitioners Castillo, Branch, Avraam, and Whitecliff were also convicted of voluntary manslaughter of federal officers, in violation of 18 U.S.C. 1112 and 1114. Petitioner Craddock was convicted of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d).

Petitioners Castillo, Branch, Avraam, and Whitecliff were sentenced to consecutive terms of ten years' imprisonment for manslaughter and 30 years' imprisonment for the firearms offense, to be followed by five years of supervised release. Petitioner Craddock was sentenced to consecutive terms of ten years for the firearms offense and ten years for possession of a destructive device, to be followed by five years of supervised release. Petitioners Castillo, Branch, Whitecliff, and Craddock were fined $2000 each, petitioner Avraam was fined $10,000, and petitioners together were ordered to pay $1.1 million in restitution. The

[1] Unless otherwise noted, references in this brief to 18 U.S.C. 921 and 924 are to the versions of those statutes in effect at the time of petitioners' offenses.

court of appeals affirmed. Pet. App. 1a-116a (original appeal), 144a-162a (appeal after remand for resentencing on firearms convictions).

1. On February 28, 1993, agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) attempted to execute an arrest warrant for Vernon Howell, also known as David Koresh, and a search warrant for a large compound known as Mount Carmel outside Waco, Texas. Koresh was the leader of the Branch Davidians, a religious sect that resided at the compound. At daily Bible studies, Koresh taught the Davidians that they would be "translated" into heaven following an apocalyptic confrontation with outsiders, to whom he referred as "the beast" and "the enemies." Koresh instructed the Davidians to prepare for the final battle, and preached that "if you can't kill for God, you can't die for God." The group fortified the Mount Carmel compound, and built a large stockpile of weapons and ammunition, in anticipation of a violent confrontation with the outsiders. As part of their preparations, the Davidians illegally converted semiautomatic rifles into fully automatic machineguns. Pet. App. 2a-3a, 65a-67a, 75a; Gov't C.A. Br. 4-10.[2]

Approximately 45 minutes before the ATF agents arrived on February 28, Koresh learned that the agents were planning a raid. Pet. App. 3a, 16a-17a, 66a-67a; Gov't C.A. Br. 12-15. The ATF agents, who were wearing raid uniforms that identified them as police officers, arrived at Mount Carmel in two cattle trailers covered with tarp. After several agents alighted and approached the entrance, announcing that they were

[2] "Gov't C.A. Br." refers to the government's brief in the court of appeals in connection with petitioners' first set of appeals (Fifth Circuit No. 94-50437).

police officers, gunfire erupted from the compound's front doors and windows. Pet. App. 4a, 17a-18a; Gov't C.A. Br. 15-16, 18-28.[3] Around the same time, three National Guard helicopters flying toward the rear of the compound (to create a visual diversion) turned back after they were hit by gunfire from the compound. Pet. App. 4a; Gov't C.A. Br. 17-18.

The ensuing gun battle between the ATF agents and the Branch Davidians lasted nearly two hours. During the gun battle, the Davidians shot fully automatic firearms at the agents.[4] Agents Steven Willis, Conway LeBleu, Todd McKeehan, and Robert Williams were killed by gunfire from the compound. Twenty-two other agents were wounded. Pet. App. 4a, 86a; Gov't C.A. Br. 28-30, 33-40.

Although a cease-fire was negotiated, Koresh and many of the Branch Davidians refused to leave the

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[3] Petitioners assert (Br. 5) that "[w]ho fired the first shot was disputed." The court of appeals concluded that "[t]he evidence [at trial] d[id] not permit any reasonable inference but that the Davidians fired the first shots that morning." Pet. App. 20a.

[4] At trial, thirteen ATF agents testified that they heard fully automatic gunfire coming from the compound during the battle on February 28. Tr. 1297, 1300-1301 (Ballesteros); 1744-1748 (Curtis); 1956-1958 (Mayfield); 1999-2000 (Richardson); 2067-2068, 2074-2075 (Champion); 2141-2143 (Alexander); 2220-2224 (Sprague); 2330-2331 (Petrilli); 2404-2405, 2409-2410 (Shiver); 2514-2515 (Cohen); 2689-2690 (Buford); 3116 (Chisholm); 3624-3625 (Appelt). A reporter who arrived on the scene shortly after the agents also testified that he heard fully automatic gunfire at the compound. Tr. 6561-6562. A local sheriff's officer testified that he heard automatic gunfire over the telephone when he answered a 911 call from the compound during the battle. Tr. 6514-6515. An FBI expert who reviewed the soundtrack of a videotape of parts of the gun battle testified that some sounds on the tape were consistent with automatic gunfire (Tr. 6124, 6128-6129).

compound. Agents of the Federal Bureau of Investigation (FBI) then surrounded the compound and engaged in extended negotiations with Koresh, who instructed the Davidians to open fire if agents attempted to enter the compound. On April 19, 1993, after a 51-day standoff, the agents attempted to induce the compound's remaining occupants to leave by flooding the compound with tear gas. Around noon, however, fire broke out in the compound. Most of those remaining in the compound died in the fire or from gunshot wounds. Pet. App. 4a, 68a-69a, 121a; Gov't C.A. Br. 42-55.

After the fire, Texas Rangers searched the compound area. They recovered 46 rifles, as well as two lower receivers, that had been modified to fire as fully automatic machineguns. Tr. 1169-1171, 1175-1177, 1179-1180, 1182-1183, 1187. Twenty-two illegal silencers and several silencer components in various stages of manufacture were also found. Tr. 835-836, 1004-1014, 1032-1034, 1037-1039, 1186-1190, 1196-1198, 4952-4956. In addition, the Texas Rangers found hundreds of fragments from exploded hand grenades. Tr. 915-916, 962, 997-998, 1002, 1057, 1077, 6145-6146. Numerous other weapons were also found. Gov't C.A. Br. 55-56.

2. a. The evidence at trial showed that petitioner Castillo retrieved his AR-15 assault rifle and joined Koresh and several other Davidians at the front doors of the compound when the ATF agents first arrived on February 28. When the gun battle began, Castillo attempted to chamber a round and shoot his rifle, but it jammed. He then retrieved a pistol from his room and went down the hall to another room on the first floor. Tr. 3049-3054, 3087-3089, 3091-3094, 3100-3101, 4516; Pet. App. 45a-50a, 59a-61a, 67a, 71a-72a. Marjorie Thomas, one of three Branch Davidians who testified at trial, later saw Castillo briefly with a gun at the end of

the corridor on the second floor. Dep. Tr. 35-37, 45, 106-107; Pet. App. 60a.[5]

After the cease-fire was declared, Castillo retrieved an AK-47 assault rifle from the kitchen and stood guard at the kitchen door. When ATF agents were allowed into the interior courtyard to rescue a severely wounded agent, Castillo briefly pointed his rifle at one of the agents. Tr. 2971-2977, 2982-2995, 3109-3112, 3122-3125, 3132-3139; Pet. App. 60a-61a, 67a, 71a-72a. During the stand-off, Castillo stood guard with an AK-47 assault rifle in his room on the first floor. Tr. 4131-4132, 4499-4501, 4514; Pet. App. 69a.

Castillo and two other Davidians escaped from the compound during the fire on April 19 through a hole on the right side of the building. Tr. 5349-5351, 5380-5381, 5393-5394, 6336-6337. Castillo, whom the FBI agents had nicknamed "Elvis," wore a black tank top and an assault vest. Tr. 5009-5010, 5122-5124, 5383-5386, 5389-5391, 5418-5421, 6330-6333; GX 1169, 2147. He and the other two Davidians walked to a nearby boat, where they were joined by another Davidian who had escaped from the burning compound. They left two assault vests, two pistols, ammunition, knives, clothing, and other belongings in a pile. Tr. 5350-5355, 5359-5368, 5381-5386, 5390-5391, 5420-5425, 5469-5470, 5660-5661, 5665-5677. An FBI agent found a live hand grenade in the assault vest that Castillo had taken off and left in the pile. Tr. 5352-5355, 5662-5665, 6133, 6142-6143, 6147-6148; GX 1112.[6]

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[5] "Dep. Tr." refers to the transcript of Thomas' videotaped deposition, which was shown at trial.

[6] The following day, a Texas Ranger found a second hand grenade in a blue jacket that was left in the pile by the boat. Tr. 5675, 5683-5686, 6132-6133, 6142-6143, 6147-6148; GX 1109B.

b. Petitioner Branch shot a rifle at ATF agents from rooms on the second floor of the compound during the gun battle on February 28. Tr. 4095-4100, 4109-4110, 4152-4155, 4157-4161, 4173, 4237-4238; Dep. Tr. 36-39, 45; Pet. App. 58a-59a, 67a, 71a. Victorine Hollingsworth, the second Branch Davidian who testified at trial, heard Branch exclaim, during the gun battle, "He nearly got me and I got one." Tr. 4099-4100; Pet. App. 59a. Kathryn Schroeder, the third Branch Davidian who testified at trial, heard Branch running around and yelling in the hallway on the first floor during the gun battle. Tr. 4467; Pet. App. 59a.

During the stand-off, Branch, armed with an M-1A .308 caliber rifle, stood guard in the compound chapel with Thomas and petitioner Whitecliff. Tr. 4502-4503, 4506, 4513, 4603-4605, 4608-4609; Dep. Tr. 47-51, 156; Pet. App. 59a, 69a. Thomas overheard Branch brag to Whitecliff, Castillo, and another Davidian that he had shot an agent during the gun battle. Dep. Tr. 48-51; Pet. App. 59a. Branch left the compound on March 19, during the stand-off. Tr. 4539, 5082.

c. Petitioner Whitecliff shot at the helicopters that approached the rear of the compound during the gun battle on February 28. Tr. 4515, 4628-4629; Pet. App. 61a-62a, 67a, 71a, 73a. During the stand-off he stood guard in the chapel with Thomas and petitioner Branch. He was armed with a FN-FAL .308 caliber rifle. Tr. 4111-4113, 4198-4199, 4502-4503, 4513-4514; Dep. Tr. 45-48; Pet. App. 61a, 69a, 73a. Thomas overheard Whitecliff tell Branch, Castillo, and another Davidian that he had shot an agent during the gun battle. Dep. Tr. 48-51; Pet. App. 61a-62a. Whitecliff, like Branch, left the compound on March 19, during the stand-off. Tr. 4539, 5096

d. Petitioner Avraam fired a rifle at ATF agents from the gymnasium on the right rear side of the compound during the gun battle on February 28. Tr. 4515-4517, 4654-4655; Pet. App. 57a-58a, 67a, 72a. During the stand-off, Avraam stood guard in the areas above the gymnasium and chapel, armed with a .50 caliber rifle. Tr. 4496-4498, 4646, 4656-4658, 4726, 4734-4735, 4910-4912; Dep. Tr. 56-57; Pet. App. 57a-58a, 69a, 72a. Avraam escaped from the compound during the fire on April 19 by climbing out a second-floor front window and sliding off the lower roof. Before sliding down himself, Avraam pulled a handgun and a magazine out of his pockets and shoved them down the roof. Tr. 5242-5245, 5326-5331, 5340, 5349-5350, 5362-5371, 5375-5380, 5418-5419, 5444-5452, 6090-6091.

After his arrest, Avraam shared a jail cell with Bradley Rogans. Avraam told Rogans that during the gun battle he had a fully automatic weapon that had been issued to him sometime before the ATF raid on February 28. Tr. 6088-6089.[7] Avraam also told Rogans that he had not shot at the agents, but then he laughed and said he was not a bad shot. Tr. 6086-6088, 6095-6096; Pet. App. 58a.

e. Petitioner Craddock learned from Koresh and another Davidian on the morning of February 28 that there would be a confrontation with ATF agents. Tr. 6383-6586; Pet. App. 68a. Craddock returned to his room on the first floor, changed into his black clothing, and retrieved his AR-15 assault rifle. Craddock then went to the kitchen and loaded his 9 mm. handgun with ammunition, but Koresh told him to stay in his room.

[7] Koresh had distributed weapons to the Davidians during a Bible study two weeks before the ATF raid. Tr. 4132-4134, 4726-4727, 4734, 6348-6349; Dep. Tr. 65-67.

Tr. 6349-6351, 6383-6391, 6402-6404, 6407-6414; Pet. App. 68a, 72a. During the stand-off, Craddock stood guard in Schroeder's bedroom on the first floor, carrying both the AR-15 assault rifle and the 9 mm. pistol. Tr. 4501-4502, 4513, 6348-6349, 6352; Dep. Tr. 45-46, 141-143, 150-152; Pet. App. 69a.

Craddock escaped from the compound during the fire on April 19 and hid for a time in a cinder block building next to the water tower. Tr. 6352-6354, 6397-6398. After he was arrested, Craddock admitted to the Texas Rangers that Koresh had given him a hand grenade earlier that morning. Tr. 6351-6352, 6375-6376, 6404-6406, 6441. The Texas Rangers found the hand grenade, as well as a pistol, a magazine vest, a gas mask, and ammunition, in the cinder block building. Tr. 6056-6059, 6075-6077, 6133, 6142-6143, 6147-6148, 6354, 6398.[8]

3. Petitioners were charged with, among other crimes, conspiring to murder federal officers, in violation of 18 U.S.C. 1117, and using and carrying firearms during and in relation to that conspiracy (a "crime of violence"), in violation of 18 U.S.C. 924(c)(1). J.A. 14-21, 22-23. The district court instructed the jury that in order to find a defendant guilty under Section 924(c)(1), it must find "[t]hat the Defendant under consideration committed the crime alleged in Count One of the Indictment," which was the conspiracy to murder. J.A. 29. The instructions defined the term "firearm" to mean "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." J.A. 30; see 18 U.S.C. 921(a)(3). The jury acquitted each petitioner on the conspiracy count,

[8] The Rangers later found a fourth hand grenade in the concrete bunker where Koresh stored some of his weapons. Tr. 903, 912, 915-916, 930-931, 6133-6134, 6142-6143, 6147-6148.

but found each guilty of the firearms offense. J.A. 32-33, 35-36.

In sentencing petitioners on the firearms count, the district court observed that 48 machineguns, four live hand grenades, and numerous grenade fragments were retrieved from the ruins of the Mount Carmel compound and vehicles immediately surrounding it. Pet. App. 124a-125a. The court noted that each of the defendants "stood guard [during the stand-off], with order[s] to fire should the FBI agents attempt entry"; that "[n]umerous witnesses testified to the use of automatic weapons during the February 28th firefight with ATF agents"; and that the testimony to that effect was corroborated by an FBI agent's identification of "fully automatic weapon fire on the video recordings made on that date." *Id.* at 125a.

The court found that the evidence "established the existence of not only a figurative but a literal fortress, manned by each of the [petitioners]," and that each petitioner had either "actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993, and through the 51 day siege." Pet. App. 124a. In addition, the court explained (*id.* at 122a) that "[b]y its verdict convicting the [petitioners] of violating Section 924(c)(1), the jury found that they were members of a conspiracy to murder federal agents." The court found that three members of the conspiracy (including petitioners Avraam and Craddock) actually possessed a machinegun or destructive device between February 28 and April 19, and that "the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all" the conspirators. *Id.* at 126a-127a. For sentencing purposes, the court held, each petitioner "should be held accountable under

Pinkerton [v. *United States*, 328 U.S. 640 (1946)] for using and carrying machineguns, destructive devices and silencers during their conspiracy to murder federal officers." Pet. App. 126a.

The district court rejected (Pet. App. 127a-134a) petitioners' argument that it could not impose a 30-year sentence on any petitioner under Section 924(c)(1) in the absence of a jury finding that that petitioner had used or carried a machinegun, destructive device, or silencer. The court held instead (*id.* at 129a-130a) that the type of "firearm" involved in the offense was a sentencing factor, "not an element of the offense." Having held that petitioners shared responsibility for the use and carrying of machineguns and grenades in relation to their conspiracy, the court concluded that each petitioner was subject to a 30-year sentence under Section 924(c)(1). *Id.* at 126a-127a, 134a.[9]

4. The court of appeals affirmed petitioners' convictions, including those under Section 924(c)(1). Pet. App. 1a-116a; see *id.* at 63a-73a. The court rejected the claim that petitioners could not be convicted of using or carrying firearms during and in relation to a conspiracy to murder, when the jury had acquitted them on the conspiracy count itself. *Id.* at 65a. The court observed that "[t]he record is replete with evidence of a

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[9] The court imposed 30-year terms on petitioners Castillo, Branch, Avraam, and Whitecliff, consecutive to their 10-year sentences for manslaughter. 6/16/94-6/17/94 Tr. 222-223 (Castillo), 226 (Branch), 227 (Avraam), 229 (Whitecliff). Although it held that petitioner Craddock was subject to the same sentence under Section 924(c), the court "depart[ed] downward" in his case and imposed only a 10-year sentence, consecutive to a 10-year sentence for possession of a grenade. *Id.* at 230-232; Pet. App. 79a, 146a & n.2. The government did not challenge Craddock's sentence on appeal. See Pet. App. 79a.

conspiracy to murder federal agents and each individual [petitioner's] membership in that conspiracy." *Ibid.*; see *id.* at 65a-70a. Likewise, the court found "overwhelming" evidence "that each of the five [petitioners] 'used' a firearm" within the meaning of Section 924(c) (*id.* at 71a), and did so "during and in relation [to]" the conspiracy (*id.* at 72a).

The court also rejected petitioners' argument that the type of firearm used or carried was an offense element, rather than a sentencing factor, under the applicable version of Section 924(c)(1). Pet. App. 78a-85a. Relying on the statute's structure and history, the court concluded that Congress did not intend to create separate offenses when it amended Section 924(c) to provide for stiffer penalties in cases involving certain types of weapons. *Id.* at 81a, 85a. The court accordingly held that "[t]he Government need not charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant." *Id.* at 85a.

The court held, however, that the sentences imposed under Section 924(c) could not stand to the extent they rested only on the district court's finding that each petitioner had "actual or constructive possession" of the machineguns and grenades present in the Davidians' compound. Pet. App. 85a-86a. The court explained that under this Court's intervening decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), the government must prove "active employment" of a firearm in order to satisfy the "use" element of Section 924(c)(1). Pet. App. 86a. Although there was "evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy," the court noted that "[w]ith *Bailey* the district court must take another look and enter its

findings regarding 'active employment.'" *Ibid.* It therefore vacated the sentences imposed under Section 924(c), and remanded for resentencing on that count. The court made clear that if the district court "[s]hould * * * find on remand that members of the conspiracy actively employed machineguns, it [would be] free to reimpose the 30-year sentence." *Ibid.*[10]

5. After this Court denied review, 520 U.S. 1185 (1997), the district court reconsidered petitioners' sentences under Section 924(c) in accordance with the court of appeals' mandate. See Pet. App. 165a-169a. Reviewing the evidence in light of *Bailey*, the court found that petitioners Branch, Castillo, Craddock, and Avraam each personally used or carried "enhancing weapons" during and in relation to the conspiracy. *Id.* at 167a.[11] The court noted that there was "no direct

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[10] The court also concluded that the district court did not err in refusing to instruct the jury on self-defense and defense-of-another (Pet. App. 8a-30a); that the jury's finding of guilt on the firearms count could stand, despite its acquittal on the conspiracy count (*id.* at 31a-38a); that the district court did not abuse its discretion by according the jurors limited anonymity (*id.* at 38a-44a) or by admitting some of petitioner Castillo's post-arrest statements into evidence while excluding others (*id.* at 45a-56a); that the evidence was sufficient to sustain the manslaughter convictions (*id.* at 56a-63a); and that the district court properly applied the Sentencing Guidelines (*id.* at 86a-98a). Judge Schwarzer, sitting by designation, dissented with respect to the self-defense instruction, the exclusion of portions of Castillo's statement, and the sufficiency claim, but he expressed no view on the validity of petitioners' sentences on the firearms counts. *Id.* at 98a-116a.

[11] Count 1 of the indictment charged that the conspiracy to murder federal agents lasted from February 1992 through April 19, 1993. J.A. 14. The court found that Branch had been seen firing a fully automatic weapon from the second floor of the compound during the gun battle on February 28, 1993; that Avraam had admitted carrying and using a fully automatic weapon on

evidence that [petitioner] Whitecliff personally used or carried an enhancing weapon," but it reiterated that "[m]ore than a preponderance of the evidence clearly demonstrates that many members of the conspiracy fired, brandished, displayed *and* carried fully automatic machine guns and hand grenades during the period of the conspiracy," and that "those acts were foreseeable and foreseen by each [petitioner]." *Id.* at 168a-169a; 9/4/97 Tr. 33. Relying in part on its previous discussion of responsibility for co-conspirators' acts under the *Pinkerton* doctrine, see Pet. App. 125a-127a, the court reimposed the same sentences that it had originally imposed under Section 924(c)(1). *Id.* at 169a.

6. The court of appeals affirmed. Pet. App. 144a-162a. Based on the law of the case doctrine, the court declined to revisit its previous holding that the type of firearm used or carried was a sentencing factor, not an offense element, under former Section 924(c)(1). *Id.* at 151a-155a.

The court rejected (Pet. App. 154a) petitioners' contention that its position was inconsistent with this Court's intervening decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Jones* v. *United States*, 526 U.S. 227 (1999). It noted that its treatment of the sentencing-factor issue on petitioners' earlier appeal "accord[ed] with the directive in *Almendarez-Torres* * * * to look at 'language, structure, subject matter, context, and history' in determining whether or not Congress intended for a statute to define a separate crime." Pet. App. 154a (quoting *Almendarez-Torres*, 523 U.S. at 228). With respect to *Jones*, the court

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February 28; that Castillo had a live grenade on his person when he escaped from the compound on April 19, 1993; and that Craddock also carried a grenade on April 19. Pet. App. 167a-168a.

concluded that in that case "the legislative history contained conflicting indications of whether Congress intended for * * * the statute at issue[] to lay out three distinct offenses or a single crime with three maximum penalties," whereas "the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns." *Ibid.* The court declined to consider petitioners' new arguments based on the doctrines of "constitutional doubt" and lenity, observing that petitioners had not advanced those arguments on their first appeal, and had not shown that failure to consider them belatedly would lead to "plain error." *Id.* at 151a, 155a.

The court also "decline[d] to reconsider [its] prior approval of the district court's application of the *Pinkerton* doctrine" for purposes of sentencing. Pet. App. 160a. In light of that ruling, the court did not address petitioners' claims that the district court clearly erred in finding, on remand, that petitioners Branch, Avraam, Castillo, and Craddock personally used or carried machineguns or hand grenades, and in relying on conduct after February 28 in resentencing Castillo and Craddock. *Id.* at 160a n.16. The court refused to revisit its holding that petitioners could be convicted under Section 924(c) even though they had been acquitted of conspiracy to murder (*id.* at 155a-157a), and held that petitioners had waived any objection to the jury instruction on "use" of a firearm (*id.* at 157a-158a) or to the district court's use of a preponderance standard in finding facts relevant to sentencing (*id.* at 160a-161a). In this Court, petitioners have challenged only the court of appeals' construction of former Section 924(c)(1). Pet. i; Pet. Br. i.

SUMMARY OF ARGUMENT

Section 924(c)(1) varies the punishment for the use or carrying of a firearm during and in relation to a predicate offense based on the type of firearm involved in the offense. The question here is whether proof of the type of firearm is an element of the offense, which must be submitted to the jury and found beyond a reasonable doubt, or, alternatively, is a sentencing factor for the judge. That question is first one of legislative intent. Applying the traditional tools of statutory construction—statutory text, structure, context, and history—the type of firearm in a Section 924(c)(1) offense is a sentencing factor.

The text of former Section 924(c)(1) contains a complete set of offense-defining elements in the statute's introductory clause. A defendant who uses or carries a firearm, during and in relation to a predicate crime of violence or drug trafficking crime, has committed an offense. Significantly, the statute bases liability on the use or carrying of "a firearm," without regard to type. The critical factor is that the defendant has availed himself of a firearm in the commission of another serious crime. Only in successive clauses does the statute go on to specify higher penalties than the basic five-year term in light of the type of weapon involved in the offense, *e.g.*, ten years for a short-barreled gun, and 30 years for a machinegun, destructive device, or firearm equipped with a silencer. Those clauses addressing the type of firearm, which are worded in the passive voice, do not stand on their own as complete offenses. They relate, instead, solely to the issue of punishment.

The structure of the statute supports the conclusion that the type of firearm is a sentencing factor, and differentiates Section 924(c)(1) from the carjacking

statute construed in *Jones* v. *United States*, 526 U.S. 227 (1999), in two critical respects. First, in contrast to the enhancements in the carjacking statute for resulting injury and death, which introduced new issues into the crime, Section 924(c)(1) already requires proof that the defendant used or carried a firearm; the remaining issue is solely of the *type* of firearm that will determine the defendant's sentence. Second, Section 924(c)(1) provides sentence enhancements not only for type of firearm, but also, in immediately adjacent clauses, for the defendant's recidivism. That conjunction of firearm type with recidivism—the classic sentencing factor, see *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)—indicates a congressional intention to treat both matters as relevant to sentence, not as creating new, aggravated offenses.

There is no settled or traditional practice of making firearm type an offense element that must be submitted to the jury. Nor is there a pattern in federal gun statutes that would argue in favor of treating type of firearm as an offense element in Section 924(c)(1). While some federal firearms statutes do focus on the type of weapon at issue, those statutes, in contrast to Section 924(c)(1), do not define an offense regardless of the type of firearm involved. And the legislative history and evolution of Section 924(c)(1) support treating firearm type as a sentencing factor. Congress consistently spoke of "penalties" and "prison terms" in describing the machinegun clause and related enhancements, and it never characterized those provisions of Section 924(c)(1) as creating "offense elements."

Finally, the principle that this Court will construe a statute, if fairly possible, to avoid a difficult constitutional question does not justify construing the machinegun enhancement in Section 924(c)(1) to be an element

of a separate offense. Unlike in *Jones*, where the Court concluded, before turning to the doctrine of constitutional doubt, that the fairest reading of the carjacking statute was to treat the disputed factor as an offense element, the fairest reading of Section 924(c)(1) is that it creates a sentencing factor when a machinegun is involved in the offense. In addition, this Court is squarely presented with the question whether a sentencing factor that raises the maximum authorized sentence for a crime is constitutional in *Apprendi* v. *New Jersey*, No. 99-478. If the Court resolves that constitutional issue broadly in favor of the State, there will be no constitutional doubt to weigh in the scales here. If the Court resolves the constitutional issue narrowly, whatever doubt remains will not be sufficient to overcome the indications of Congress's intent to create sentencing factors in Section 924(c)(1)—and petitioners have not asked this Court to resolve any constitutional question.

If, however, the Court resolves *Apprendi* against the State by adopting a broad constitutional prohibition against sentencing enhancements that raise the maximum authorized punishment, as "suggest[ed]" in *Jones*, 526 U.S. at 243 n.6, then the Court will face in this case the alternatives of either invalidating the sentencing enhancements that Congress provided in Section 924(c) for uses of particularly dangerous firearms, or determining that the statute should, under the circumstances, be applied in a way that avoids unconstitutionality under controlling precedent. Because Congress clearly intended that greater punishment be available for defendants whose Section 924(c)(1) offenses involved more dangerous weapons, and because there is nothing to indicate that Congress would have refrained from authorizing those sentences if additional procedures were required, it would be more consistent with Congress's intent to preserve the availability of the type-of-weapon enhancements, subject to compliance with specified procedures, than to invalidate them outright. Should the Court adopt that approach, it would follow that the sentencing procedures in this case involved constitutional error. In that event, it would be appropriate to remand the case to allow the court of appeals to consider the application of plain-error and harmless-error principles.

ARGUMENT

THE TYPE OF FIREARM USED IN AN OFFENSE UNDER FORMER SECTION 924(c)(1) IS A SENTENCING FACTOR, NOT AN ELEMENT OF THE OFFENSE

Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Accordingly, the question whether a particular factor mentioned in a federal criminal statute—in this case, the type of firearm used or carried during and in relation to a crime of violence—is an offense element or a sentencing factor is first and foremost a question of congressional intent. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); see also *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999). Like other such questions, it is best approached in the first instance by considering the "language, structure, subject matter, context and history" of the provision in question. *Almendarez-Torres*, 523 U.S. at 228.

A. The Text And Structure Of Section 924(c)(1) Create A Single Offense, With Graduated Penalties Based On The Type Of Firearm Used Or Carried In The Offense

1. The language and structure of former Section 924(c)(1) reflect Congress's intent to define a single offense of using or carrying any type of firearm—including a machinegun or "destructive device"—during and in relation to certain violent or drug-related crimes.[12] The opening clauses of the text define the elements of that offense: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * *, be sentenced to imprisonment for five years * * *." That language sets out "two distinct conduct elements—* * * the 'using and carrying' of a gun and the commission of a [predicate crime]." *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see also *Bailey* v. *United States*, 516 U.S. 137, 142-143 (1995) ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime . . ., uses or

[12] Most courts of appeals that considered the question concluded that firearm type was a sentencing factor, not an offense element, under the version of Section 924(c)(1) at issue here. *United States* v. *Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999), petition for cert. pending, No. 99-6907; *United States* v. *Alborola-Rodriguez*, 153 F.3d 1269, 1272 (11th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); *United States* v. *Shea*, 150 F.3d 44, 51-52 (1st Cir.), cert. denied, 525 U.S. 1030 (1998); Pet. App. 78a-85a. The Ninth Circuit reached the opposite conclusion in *United States* v. *Alerta*, 96 F.3d 1230, 1235 (1996). Contrary to petitioners' claim (Br. 24), before *Alerta* no circuit had squarely held that type of firearm was an element of the offense. See Pet. App. 83a-84a.

carries a firearm.'"); *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (same).

The opening language also includes the central element that serves the statute's distinctive purpose: What the defendant "uses or carries" must be a "firearm." That term is elsewhere defined very broadly to include, among other things, "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive," or any "destructive device." 18 U.S.C. 921(a)(3).[13] Thus, in this case, it was necessary to the criminality of petitioners' conduct under Section 924(c)(1) that they use or carry a type of "firearm" during and in relation to unlawful conduct. By the same token, however, the criminality of their conduct under that Section was complete once they used or carried, during and in relation to that conduct, *any* "firearm," whether it was a handgun, a short-barreled shotgun, or a machinegun or "destructive device."

[13] As petitioners recognize (Br. 13 n.8), the "enhancing" weapons specified in Section 924(c)(1) are merely subcategories of the broader category of firearms. For example, Section 921(a)(23) provides that "[t]he term 'machinegun' has the meaning given such term in * * * 26 U.S.C. 5845(b)." Section 5845(b) defines "machinegun" to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." That definition covers any fully automatic weapon, see *Staples*, 511 U.S. at 602 & n.1; and any weapon that falls within it is necessarily also a "firearm" as defined in Section 921(a)(3). That subsection also expressly includes "any firearm muffler or silencer" and "any destructive device." See also 18 U.S.C. 921(a)(5) and (6) (defining "shotgun" and "short-barreled shotgun"), 921(a)(7) and (8) (defining "rifle" and "short-barreled rifle"). Thus, the enhancing weapons are types of "firearms" the use or carrying of which is prohibited by Section's 924(c)'s offense-defining clause.

The remaining provisions of Section 924(c)(1) do not stand on their own as definitions of new offenses. Compare, *e.g.*, 18 U.S.C. 2113(e). Rather, once the initial clauses have defined the prohibited conduct and set a minimum penalty, the following clauses provide for graduated penalties based on two additional factors: whether the firearm involved in the criminal conduct was of a specified type, and whether the defendant is a repeat offender. In describing the enhancing weapons, the statute is worded in the passive voice ("and if the firearm is a machinegun"), rather than the active voice of the introductory clause ("Whoever * * * uses or carries a firearm"), making clear that no additional conduct by the defendant is required for the stiffer sentence. Rather, the issue, given that the defendant is guilty of using or carrying the firearm, is what type of firearm should be considered in imposing punishment.

2. As petitioners point out (see Br. 30-31), the structure of Section 924(c)(1) resembles in some respects that of the federal carjacking statute, 18 U.S.C. 2119 (1994 & Supp. IV 1998), which defines a base offense and then provides for heavier penalties in cases involving serious bodily injury or death. In *Jones* v. *United States*, 526 U.S. 227, 232-239 (1999), this Court ultimately concluded that Congress intended serious injury and death to be elements of separate, aggravated offenses under Section 2119. There are, however, two important structural differences between the statutes that call for a different conclusion here.

First, unlike the injury and death elements at issue in *Jones*, the considerations of firearm type that are relevant to sentencing under Section 924(c)(1) do not introduce into the statute any new factor, not already embodied in the basic definition of the offense. The elements of the basic carjacking offense—taking a car,

from another, by force or threat, and so on—do not include any form of bodily injury. See *Holloway* v. *United States*, 526 U.S. 1, 8-12 & n.6 (1999) (even after addition of element requiring "intent to cause death or serious bodily harm," no actual or attempted harm required to complete offense). In contrast, the basic elements of the firearms offense defined by Section 924(c)(1) explicitly include the use or carrying of a "firearm."

As noted above, the definition of a "firearm" for purposes of the statute includes all of the particularly dangerous weapons for which the provision goes on to specify enhanced punishments. Moreover, the Section's offense-defining language refers to any person who "uses or carries *a* firearm" during and in relation to criminal conduct, while the subsequent clauses refer back to that language and provide for greater punishment "if *the* firearm" involved is one of several specified types. 18 U.S.C. 924(c)(1) (emphasis added). Because those punishment provisions merely distinguish among more and less serious manners or methods of committing the same firearms offense, rather than introducing any new or different factor or consideration (such as resulting injury) into the analysis, they are best understood as identifying sentencing factors, not as defining extra elements of new offenses. Cf. *United States* v. *Sims*, 975 F.2d 1225, 1236 (6th Cir. 1992) ("[B]y establishing different sentences for different types of weapons, Congress expressed its intention to punish more severely the use and carrying of what it considers to be more dangerous weapons."), cert. denied, 507 U.S. 932, 998 and 999 (1993).

Second, the punishment clauses in Section 924(c)(1), unlike those in Section 2119, address two different sentencing factors—and one of those factors is recidivism.

This Court has recognized that recidivism is a common, and perfectly proper, sentencing factor. See *Almendarez-Torres*, 523 U.S. at 230; *Monge* v. *California*, 524 U.S. 721, 728-729 (1998); see also *Jones*, 526 U.S. at 248-249. The fact that Congress coupled type-of-firearm with the traditional recidivism factor in varying the severity of punishment under Section 924(c)(1) indicates that Congress intended the courts to treat firearm type, like recidivism, as a sentencing factor.

3. Petitioners do not address the textual features of Section 924(c)(1) that differentiate it from the carjacking statute at issue in *Jones*. They do note (Br. 12) that the term "firearm" and the specified firearm types "are all in the same sentence and are separated by mere commas." That observation, however, more readily leads to the conclusion that the first sentence of Section 924(c)(1) defines a single offense, with punishment provisions that vary depending on precisely how the offense is committed. Petitioners also contend (Br. 16-17) that this Court's interpretation of the term "conviction" in *Deal* v. *United States*, 508 U.S. 129 (1993), supports their position. *Deal*, however, construed the statute's recidivist provision, which stiffens penalties "[i]n the case of [a] second or subsequent conviction." 18 U.S.C. 924(c)(1). The Court held that this repeat-offender enhancement applies even when the second "conviction" was obtained in the same prosecution as the first. 508 U.S. at 132. The Court did not discuss what elements must be established in order to obtain either conviction, and the decision has no bearing on this case.[14]

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[14] Petitioners also seek to rely (Br. 17 n.14) on *Garrett* v. *United States*, 471 U.S. 773 (1985), which held that the federal "continuing criminal enterprise" statute, 21 U.S.C. 848, defines an offense separate from the predicate offenses of which it takes account, and may give rise to separate and cumulative punishment. 471 U.S. at 784. *Garrett*'s discussion of the terms "convictions" and "convicted" in the recidivist and forfeiture provisions of Section 848, *id.* at 781, are not relevant here.

Finally, citing *Bailey* v. *United States*, 516 U.S. 137 (1995), and cases from the lower courts, petitioners argue (Br. 20-26) that their construction of firearm type as an offense element is somehow "inherent" (Br. 20) in a different element-defining statutory phrase, "uses or carries." That is incorrect, because a jury could certainly find that a defendant "use[d]" a "firearm," in the sense of "active employment" required by *Bailey*, 516 U.S. at 148-149, without resolving the further question whether the firearm in question was *also* "a machinegun, or a destructive device, or * * * equipped with a firearm silencer or firearm muffler." 18 U.S.C. 924(c)(1). The question presented here is whether the jury, rather than a judge, must make the latter finding in order to support the 30-year sentence provided for the "use[]" of those particular "firearms." See Pet. i; Pet. Br. i, 6-7. That question is not answered by *Bailey*, or by any necessary implication from the phrase "uses or carries."[15]

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[15] The courts below held that *Bailey*'s "active employment" requirement was satisfied as to each petitioner. See pp. 13-15, *supra*; Pet. App. 71a ("The evidence is overwhelming that each of the five [petitioners] 'used' a firearm as the Supreme Court has defined the term [in *Bailey*]."); see also *id.* at 167a-168a (findings that petitioners Branch and Avraam personally used machineguns during the gun battle on February 28, 1993, and that petitioners Castillo and Craddock carried grenades on April 19, 1993). Those holdings are not at issue here. Nor is petitioner's argument (Br. 25-26) against the use of sentencing principles derived from *Pinkerton* v. *United States*, 328 U.S. 640 (1946), germane to the question on which this Court granted review. In any event, although the

B. There Is No Traditional Legislative Practice Of Making Firearm Type An Element Of Crimes Like That Defined In Section 924(c)(1)

In *Jones*, the Court noted that statutory drafting may occur "against a backdrop * * * of traditional treatment of certain categories of important facts, like the degree of injury to victims of crime, in relation to particular crimes." 526 U.S. at 234. The Court then observed that "serious bodily injury," the factor at issue in *Jones*, "has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery." *Id.* at 235.

There is no similar tradition of treating type of firearm as an element of a separate offense consisting of using or carrying a firearm during and in relation to another offense. Although petitioners suggest that modern "use a gun, go to jail" statutes like Section

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jury acquitted petitioners on the conspiracy count of the indictment, its guilty verdict on the firearms count required a finding that petitioners did conspire to murder federal agents. See J.A. 29 (jury instructions); see generally *United States* v. *Powell*, 469 U.S. 57, 65-67 (1984) (inconsistent guilty verdict is valid so long as evidence is sufficient to sustain conviction). Principles of co-conspirator liability are commonly used in sentencing a defendant within the range authorized for the offense of conviction. See, *e.g.*, Sentencing Guidelines § 1B1.3(a)(1)(B); *United States* v. *Gallo*, 195 F.3d 1278, 1281-1282 (11th Cir. 1999); *United States* v. *Luiz*, 102 F.3d 466, 468-469 (11th Cir. 1996) (per curiam); *United States* v. *Rodriguez*, 67 F.3d 1312, 1324 (7th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Aduwo*, 64 F.3d 626, 628-629 (11th Cir. 1995); *United States* v. *Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995); *United States* v. *Irvin*, 2 F.3d 72, 75-77 (4th Cir. 1993), cert. denied, 510 U.S. 1125 (1994). If, as we contend, type of firearm is a sentencing factor under Section 924(c)(1), then there is no reason not to apply the same principles in this case.

924(c) have their origins in common law offenses of "affray" or "[c]arrying arms 'malo animo,'" Pet. Br. 26-27 & n.27, they offer only one curious example of an early state statute focusing on specific weapon type. See *id.* at 26-27 & nn.27-29. Their references to contemporary state statutes and cases (Br. 28-29 & nn.32-33; Br. App. 1a-11a) produce similarly inconclusive results.[16] By petitioners' reckoning (Br. App. 1a), for

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[16] Petitioners argue that "[s]ome State laws are structurally the same as § 924(c)," Br. 28, but the examples they cite (Br. 28-29 & nn. 32-33) provide scant support for that assertion. Cal. Penal Code § 12022(a) (West 1992), for example, sets out greater enhancements for possession of an assault weapon or machinegun, but in a separate statutory subsection (§ 12022(a)(2)). Moreover, a separate Section, Cal. Penal Code § 969c, expressly provides that potential enhancements under § 12022 must be specially pleaded, that "[t]he nature of the weapon or firearm must be set forth," and that "the question whether or not [the defendant] * * * was armed with a firearm as alleged" must be resolved by the factfinder at trial if the defendant pleads not guilty. (If the defendant pleads guilty, however, that question "must be determined by the court before pronouncing judgment.") Florida's and Hawaii's statutes, like California's (and unlike Section 924(c)(1)), also deal with machineguns and semiautomatic weapons in a separate subsection, parallel to that dealing with ordinary firearms—a structure that lends itself much more easily to the interpretation that firearm type must be specially pleaded and proved. See Fla. Stat. Ann. § 775.087(2)-(3) (West 1992); Haw. Rev. Stat. Ann. § 706-660.1(1), (3) (1993). (Those provisions also impose mandatory minimum sentences, rather than authorizing higher maximum terms. Compare Fla. Stat. Ann. § 775.087(1) (West 1992) ("reclassif[ying]" certain felonies to higher sentencing categories where defendant uses or carries a firearm, without differentiating among types of firearms)). The Oregon statute is the closest in structure to Section 924(c)(1). The cases petitioners cite (Br. 28 n.32) do not, however, hold that weapon *type* must be pleaded and proved under the current version of that statute; and *State* v. *Wedge*, 652 P.2d 773, 774 n.1 (Or. 1982), makes clear that the

example, 17 States have no separate statute analogous to Section 924(c), while 19 have such statutes, but "do not necessarily impose a stiffer penalty for enhanced type weapons."[17] More pertinent here, therefore, is this Court's clear recognition that "the instrumentality used in committing a violent felony" has "always been considered by sentencing courts to bear on punishment." *McMillan*, 477 U.S. at 89.

Oregon legislature drafted the original version, which did not differentiate among firearm types, to depend on findings made *by the sentencing judge*.

[17] Petitioners' classification of statutes is open to question. They contend (Br. App. 1a), for example, that 17 States have no separate statute addressing the use of a firearm in committing a felony, but instead treat that issue under statutes creating "aggravated felonies." New Jersey is cited as an example of such a State. *Ibid.* In fact, New Jersey has express sentence enhancement provisions—adjacent to the one presently before the Court in *Apprendi* v. *New Jersey*, No. 99-478 (argued Mar. 28, 2000)—that do address the use of different types of firearms in the course of committing other felonies; and those provisions do not make firearm type an element of any offense. See N.J. Stat. Ann. § 2C:43-6(c) (West 1995) (mandatory minimum term if defendant, "while in the course of committing" murder, robbery, or various other crimes, "used or was in possession of a firearm"; mandatory "extended term" (beyond ordinary statutory maximum) if previously convicted of another firearms offense)); *id.* § 2C:43-6(g) (same but with greater minimum term if the firearm is "a machine gun or assault firearm"); *id.* § 2C:43-6(d) and (h) (in each instance, the enhancements do not apply "unless the ground therefor has been established at a hearing[,] * * * which may occur at the time of sentencing, [and at which] the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a firearm," or "was a machine gun or assault firearm"); see also *id.* § 2C:43-7(c)-(d) (extended terms imposed under foregoing provisions are greater if the weapon was a machine gun or assault firearm).

With regard to federal practice, petitioners attempt to draw support (Br. 14-15) from the fact that some other provisions of the Gun Control Act of 1968, 18 U.S.C. 921-930, apply only to specified types of firearms — which makes it necessary for the government to prove that the defendant's conduct involved one of those specified types in order to establish commission of the offense. See 18 U.S.C. 922(a)(4) (unlicensed transportation of a destructive device, machinegun, short-barreled shotgun or short-barreled rifle); 922(b)(4) (sale or delivery of a destructive device, machinegun, short-barreled shotgun or short-barreled rifle); 922(*o*) (transfer or possession of machinegun); 922(v)(1) (manufacture, transfer, or possession of semiautomatic assault weapon). None of the cited offenses, however, is structurally similar to Section 924(c)(1). Indeed, those provisions merely demonstrate that Congress knows how to make the type of firearm an offense element when it desires to do so.[18]

Petitioners also cite (Br. 14-15) the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*, which was amended and recodified as part of the Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, 82 Stat. 1227. As originally enacted in 1934, however, the NFA was designed to exercise stringent control over the circulation of machineguns and specific other dangerous, gangster-type weapons through a strict registration and taxation scheme. The definition of "firearm" in 26 U.S.C. 5845(a) is accordingly different from the defini-

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[18] In that regard, we note that Congress enacted Section 922(*o*), which prohibits transfer or possession of a machinegun, at the same time that it first added enhanced penalties for using machineguns to Section 924(c). See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453.

tion of "firearm" in 21 U.S.C. 921(a)(3). For example, the definition in Section 5845(a) includes machineguns, but does not include semiautomatic weapons, or even ordinary rifles. See *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 507 (1992) ("[t]he word 'firearm' is used as a term of art in the NFA."); see also *United States* v. *Anderson*, 885 F.2d 1248, 1250-1251 (5th Cir. 1989) (en banc).

Contrary to petitioners' contention (Br. 14), firearm type is not an element of any NFA offense in the way that petitioners would make it an element under Section 924(c)(1). The criminal offenses set forth in the NFA, 26 U.S.C. 5861, prohibit various acts involving "a firearm." Because, as just explained, "firearm" is a limited term of art under the NFA, the government must prove, in a prosecution under Section 5861, that the weapon involved in the charged offense was a machinegun, a short-barreled rifle, or some other type of weapon that is included within Section 5845's definition of that term. See *United States* v. *Meadows*, 91 F.3d 851, 856 (7th Cir. 1996); *United States* v. *Whiting*, 28 F.3d 1296, 1308-1309 (1st Cir. 1994), cert. denied, 513 U.S. 956, 994 and 1009 (1994). The appropriate analogy to this case, however, is only that in a prosecution under Section 924(c)(1), the government must prove that the defendant used or carried some weapon that comes within the applicable definition of "firearm" in Section 921(a)(3). That requirement has never been disputed, and was satisfied in this case.

C. The History Of Section 924(c) Supports The Conclusion That Firearm Type Is A Sentencing Factor

As the court of appeals explained in its first opinion in this case, the history of the enactment and amendment of Section 924(c)'s penalty provisions also points to the conclusion that Congress intended the greater penalties for certain types of dangerous firearms to be sentence enhancements, not to create new substantive offenses. Pet. App. 81a-83a; see also *United States* v. *Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999), petition for cert. pending, No. 99-6907; *United States* v. *Alborola-Rodriguez*, 153 F.3d 1269, 1272 (11th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); *United States* v. *Shea*, 150 F.3d 40, 51-52 (1st Cir.), cert. denied, 525 U.S. 1030 (1998).

1. Section 924(c) was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, Tit. I, § 102, 82 Stat. 1223, and amended by the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, Tit. II, § 13, 84 Stat. 1889. As so amended it did not include any special machinegun provision, but provided, in pertinent part:

> (c) Whoever —
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment

> for not less than two nor more than twenty-five years * * *.

18 U.S.C. 924(c) (1982). In *Simpson* v. *United States*, 435 U.S. 6, 10 (1978), and *Busic* v. *United States*, 446 U.S. 398, 404 (1980), this Court concluded that the new provision created an offense distinct from the underlying federal felony, but that Congress did not intend to allow prosecution or punishment under Section 924(c) if the statute defining the predicate felony already included its own penalty enhancement for use of a firearm.

Partly in response to *Simpson* and *Busic*, see *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997), Congress substantially revised Section 924(c) in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138-2139. See also S. Rep. No. 225, 98th Cong., 1st Sess. 312-314 (1983). Congress retained the concept that "Section 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision." *Id.* at 312. But it rejected the view that Section 924(c) was inapplicable where the predicate crime contained its own weapons enhancement. The revised Section provided, in pertinent part:

> (c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years.

18 U.S.C. 924(c) (Supp. II 1984).

Two years later, Congress added the machinegun clause to Section 924(c) as part of the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457.[19] That Act provided for an enhanced sentence of ten years for a first conviction, or 25 years for a second or subsequent conviction, if the firearm the defendant used or carried was a machinegun or was equipped with a silencer or muffler. § 104(a)(2), 100 Stat. 456-457. As amended, the statute provided in pertinent part:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime,[] including a crime of violence or drug trafficking crime, which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime,[] be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment conviction under this subsection , such person shall be sentenced to imprisonment for ten years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years.

18 U.S.C. 924(c) (Supp. IV 1986).

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[19] FOPA also amended Section 924(c) to make it an offense to use or carry a firearm during and in relation to a "drug trafficking crime." FOPA § 104(a)(2), 100 Stat. 456-457.

2. What eventually became the machinegun clause adopted by FOPA had its genesis in competing bills offered by Congressmen Hughes (H.R. 4332, 99th Cong., 2d. Sess. (1986)) and Volkmer (H.R. 945, 99th Cong., 1st Sess. (1985)) in the House of Representatives. In July 1985, the Senate passed S. 49, 99th Cong., 1st Sess. (1985), which was known as the McClure-Volkmer bill, and referred it to the House. 131 Cong. Rec. 18,232-18,236 (1985); *id.* at 18,545. The amendments to Section 924(c) in S. 49 did not include the machinegun clause. *Id.* at 18,234-18,235. S. 49 was similar to an earlier bill introduced in the House by Representative Volkmer, H.R. 945, that had not been reported out of the House Judiciary Committee, and Representative Volkmer attempted to bring both S. 49 and H.R. 945 to the House floor through a discharge petition. 131 Cong. Rec. at 28,265-28,275. See generally David A. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 620-627 (1986).

Thereafter, Representative Hughes introduced a competing bill, H.R. 4332, in the Judiciary Committee. 132 Cong. Rec. 3809 (1986) (Rep. Hughes). That bill's amendments to Section 924(c) included, for the first time, a machinegun clause that subjected a defendant to enhanced sentences of ten years for a first conviction and 20 years for a second or subsequent conviction. H.R. 4332, § 11.[20] The House Report explained that the

[20] Section 11 of H.R. 4332 was entitled "Enhanced Penalty for Machinegun Use in Crime and Other Machinegun-Related Matters." As this Court has noted, "[a] title that contains the word 'penalties' more often, but certainly not always, * * * signals a provision that deals with penalties for a substantive crime." *Almendarez-Torres*, 523 U.S. at 234.

bill "add[ed] a new mandatory prison term of ten years for using or carrying a machine gun during and in relation to a crime of violence or a drug trafficking offense for a first offense, and twenty years for a subsequent offense to the mandatory penalty provision of 18 U.S.C. 924(c)." H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986); see also *id.* at 2 (H.R. 4332 "[p]rovides a mandatory prison term of ten years for using or carrying a machine gun during and in relation to a crime of violence or a drug trafficking offense, and a mandatory twenty years for any subsequent offense"); 132 Cong. Rec. at 3809 (Rep. Hughes) (H.R. 4332 "imposes mandatory prison terms on those that would use a machinegun in the commission of a violent offense or a drug offense"); 132 Cong. Rec. at 4512 (Rep. Hughes) ("The bill provides a 10-year mandatory prison term for carrying a machine gun.").

After the House Judiciary Committee reported out H.R. 4332, Representative Volkmer proposed an amendment in the nature of a substitute. 132 Cong. Rec. at 5309; *id.* at 6835. Unlike S. 49 and H.R. 945, the Volkmer substitute included an amendment to Section 924(c) that added enhanced sentences "if the firearm [was] a machinegun, or [was] equipped with a firearm silencer or firearm muffler." 132 Cong. Rec. at 5311.

During the floor debates on H.R. 4332 and the Volkmer substitute, the supporters of both bills referred to the machinegun clauses in the two bills as requiring enhanced sentences, not creating a new offense within the existing Section 924(c). See 132 Cong. Rec. at 6837 (Rep. Hughes) (H.R. 4332 "strengthens the mandatory prison sentences for firearms used in the commission of crime—violent crime, drug trafficking crime or if a machinegun is used in the commission of a violent offense or a drug trafficking of-

fense"); *ibid.* (Volkmer substitute "creat[es] a new extra mandatory prison term for carrying a machinegun in a violent crime or a drug trafficking offense"); *id.* at 6843 (Rep. Volkmer) (Volkmer substitute "includes stiff mandatory sentences for the use of firearms, including machineguns and silencers, in relation to violent or drug trafficking crimes"); *id.* at 6850 (Rep. Moore) (Volkmer substitute "strengthen[s] criminal penalties as it * * * provides a mandatory 10-year prison term for using or carrying a machinegun or silencer in the commission of a violent crime or drug trafficking offense and a 20-year mandatory term for a subsequent offense"); *id.* at 6856 (Rep. Wirth) (combination of H.R. 4332 and the Volkmer substitute "would have many benefits, including the expansion of mandatory sentencing to those persons who use a machinegun in the commission of a violent crime or who carry a firearm in connection with a narcotics-related crime"); *id.* at 6857 (Rep. Gallo) (Volkmer substitute "provides a mandatory prison term of 10 years for using a machinegun during commission of a crime"). As the court of appeals noted, "[n]oticeably absent from both the House Report and the floor debates was any discussion suggesting the creation of a new offense." Pet. App. 82a; see *Almendarez- Torres*, 523 U.S. at 234 (noting that legislative history of 8 U.S.C. 1326 "contain[ed] no language at all that indicates Congress intended to create a new substantive crime").[21]

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[21] In *Jones*, the Court found "unimpressive" several statements in legislative history that referred to subsection (2) of Section 2119 as a penalty enhancement. 526 U.S. at 237-238. Those statements, however, were made in connection with an amendment to, rather than the adoption of, the relevant statutory language. Moreover, the Court noted that "the legislative history also contain[ed] contrary indications in some of the statements made by the 1996 amendment's sponsors, suggesting an assumption that subsection (2) established an element or elements that had to be proven at trial." *Id.* at 238. In contrast, as the court of appeals noted in this case, "the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns." Pet. App. 154a.

The House passed the Volkmer substitute and substituted it for S. 49. 132 Cong. Rec. at 7086-7092. The House version of S. 49 was then referred back to the Senate. *Id.* at 9556-9559. Senator Hatch inserted into the record a comparison of the Senate and House versions of S. 49, which noted that the House version "provide[d] mandatory penalties of 10 years for first offenders and 20 years for subsequent offenders if the firearm carried or used in violation of section 924(c) is a machinegun. The penalty also applies if the firearm carried or used is equipped with a silencer." 132 Cong. Rec. at 9593; see also *id.* at 9590 (Sen. Hatch) ("What the bill establishes are strict additional penalties for felonious use of a firearm.").[22] Senator McClure also noted that "[o]ur colleagues in the House have added additional mandatory penalties for the use of a firearm in a drug trafficking crime, and for the use of a machinegun or a silencer in a violent Federal felony." *Id.* at

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[22] Both the House and the Senate were aware of the distinction between an offense element and a sentencing factor. The House Report on H.R. 4332 noted that the version of S. 49 originally passed by the Senate "*add[ed]* an unnecessary element to the offense that the carrying be '*in furtherance of any such crime of violence.*'" H.R. Rep. No. 495, *supra*, at 9. After the House passed the Volkmer substitute to S. 49, the Senate comparison similarly noted that the Senate version had proposed "a further element of proof to Section 924(c) that the firearm was carried or used 'in furtherance of' the violent Federal crime," which was not part of the House version. 132 Cong. Rec. at 9592.

9603. The Senate passed the House version of S. 49, which became FOPA. *Id.* at 9606.

3. In 1988, Congress increased the enhanced prison term for use of a machinegun or a firearm equipped with a silencer or muffler to 30 years. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4373-4374.[23] Nothing in the legislative history of that Act "suggests that, in doing so, Congress intended to transform the statute's basic nature." See 134 Cong. Rec. 32,697 (1988) (Senate Judiciary Committee analysis noting that amendment "increases the mandatory minimum penalties for violent crimes and drug offenses involving firearms. * * * The mandatory penalty for using a machine gun or a gun with a silencer is increased from ten years to thirty years for a first offense, and from twenty years to life for a subsequent offense."); compare *Almendarez-Torres*, 523 U.S. at 236.

Congress later added additional, intermediate enhanced penalties for use of a destructive device, a short-barreled rifle, or a short-barreled shotgun. Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4829.[24] As the court of appeals explained, "[a]t no point did Congress indicate that it intended to create a new, separate offense for those weapons." Pet. App. 83a. Rather, the House report stated that the amendment "increas[ed] the mandatory additional penalties for using or carrying certain weapons during a crime of violence or a drug felony. [The amendment] provides

[23] Section 6460 of the 1988 Act was entitled "Enhanced Penalties For Use Of Certain Weapons In Connection With A Crime Of Violence Or Drug Trafficking Crime."

[24] Section 1101 of the 1990 Act was entitled "Minimum Penalty Relating To Short-Barreled Shotguns And Other Firearms."

an additional mandatory 10 years imprisonment when the weapon in question is a sawed-off shotgun or rifle, and an additional 30 years if the weapon is a destructive device." H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 107 (1990). Congress later included semiautomatic assault weapons among the firearms meriting an enhanced ten-year sentence. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102(c), 108 Stat. 1998.[25]

4. Finally, in November 1998 (after this Court decided *Almendarez-Torres* and *Monge*, but before it decided *Jones*), Congress again substantially revised Section 924(c)(1). See App., *infra*, 5a-6a (setting out current version). Apart from effectively superseding this Court's decision in *Bailey* (by making it unlawful not only to use or carry a firearm during and in relation to a covered crime, but also to "possess[]" one "in furtherance" of such a crime), the revised statute includes new provisions that address brandishing or discharging a firearm. The statute also sets forth the sentencing provisions relating to the type of firearm involved in an offense and those relating to recidivism in separate

[25] Section 110102(c) of the 1994 Act was entitled "Penalties." Curiously, the House Report states that the amendment "add[ed] use of a semiautomatic assault weapon to the crimes covered by the mandatory minimum of 5 years * * * for use in a federal crime of violence or drug trafficking crime." H.R. Rep. No. 489, 103d Cong., 2d Sess. 23 (1994). Because semiautomatic assault weapons were included within the definition of "firearm" in Section 921(a)(3), a defendant who used or carried such a weapon was already subject to the five-year mandatory minimum sentence under Section 924(c). The effect of the 1994 amendment was to make a defendant who used or carried such a firearm subject to an enhanced, ten-year sentence instead.

subparagraphs. 18 U.S.C. 924(c)(1)(B) and (C) (Supp. IV 1998).

In particular, subparagraph (B) now provides:

> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

18 U.S.C. 924(c)(1)(B) (Supp. IV 1998).

Both in subparagraph (B) and in the rest of Section 924(c)(1), Congress has changed the various fixed terms of imprisonment associated with the specified factors from fixed sentences into statutory *minimum* sentences, with an implicit statutory *maximum* sentence of life imprisonment for *any* violation. The enactment of a structurally separate sentencing provision, which refers to persons "convicted of a violation" defined elsewhere, and the change from fixed to minimum sentences confirms Congress's intent to make firearm type, like recidivism (see new subparagraph (C)), a sentencing factor. Compare *Almendarez-Torres*, 523 U.S. at 230-233 (discussing language and structure of 8 U.S.C. 1326(a)-(b)); *Jones*, 526 U.S. at 235 (citing 18 U.S.C. 248(b)(2) and 2262(b)(2) (1994 & Supp. IV 1998) as examples of statutes that "explicitly treat[] serious bodily injury as a sentencing factor"); *McMillan*, 477 U.S. at 89-90 (legislature "simply took one factor that

has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm"—or, in this case, a particular type of firearm). While "subsequent legislative history" is certainly "a hazardous basis for inferring the intent of an earlier Congress," *Jones*, 526 U.S. at 238 (internal quotation marks omitted), in this instance there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, the statute's treatment of firearm type (and recidivism) as sentencing factors rather than elements. See generally H.R. Rep. No. 344, 105th Cong., 1st Sess. 7 (1997) ("To provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes.") (capitalization omitted).

5. In sum, the history of the machinegun clause in Section 924(c) supports the view that Congress intended the stiff penalty it provided to be a sentence enhancement, not the differentiating element of a new, aggravated form of the offense. As the court of appeals noted, the clause's original legislative history repeatedly refers to the new provision as requiring a "mandatory prison term," "mandatory penalties," or "mandatory sentences" for the use of a machinegun. Pet. App. 82a. Likewise, the history of subsequent amendments to Section 924(c)—including those in 1998—supports the conclusion that Congress intended to provide new penalties, not to create new substantive offenses, when it added provisions addressing other types of firearms that it considered particularly dangerous when used or carried in violation of the Section's basic prohibition. The statute's history accordingly supports the straightforward reading of its text.

D. The Doctrine Of Constitutional Doubt Does Not Compel Adoption Of Petitioners' Construction

Relying on *Jones*, petitioners argue (Br. 30-43) that firearm type must be treated as an offense element under the doctrine of "constitutional doubt." That doctrine, petitioners suggest, requires the Court to construe the statute in favor of petitioners in order to avoid addressing the question whether Congress may constitutionally draft a criminal statute that, like Section 924(c)(1), directs the district court to impose an enhanced sentence if it finds specified facts.

Jones found the doctrine of constitutional doubt relevant in construing the carjacking statute to the extent that the government's arguments in that case left uncertainty about whether Congress intended serious bodily harm to be a sentencing factor. See 526 U.S. at 239-252; *id.* at 243 n.6 (positing possible constitutional rule that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"). The Court discussed constitutional doubt, however, only after application of the ordinary tools of statutory analysis, *id.* at 232-239, had led it to conclude that the "fairest reading" of the carjacking statute would "treat[] the fact of serious bodily harm [in 18 U.S.C. 2119] as an element, not a mere enhancement" (526 U.S. 239). That approach is consistent with the Court's earlier observation that the doctrine of doubt applies only if a statute is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled" using other interpretative techniques. *Almendarez-Torres*, 523 U.S. at 238; see also *id.* at 228 ("We therefore look to the statute before us and ask what Congress intended," because

whether a factor is an element or a sentencing factor "is normally a matter for Congress.").

In this case, application of the usual tools of statutory construction leads to the conclusion that Congress intended firearm type to be a sentencing factor under Section 924(c)(1). See pp. 20-41, *supra*. The rule of doubt accordingly does not come into play as an interpretive principle.[26] If interpretation of the statute in accordance with its terms raises a constitutional question, that question should be addressed directly in some case in which it is properly raised. Cf. *Almendarez-*

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[26] The rule of lenity likewise has no application in this case. See Pet. Br. 41-43. Notably, *Jones* did not invoke that doctrine in support of its holding. Nor did *Almendarez-Torres* imply that lenity might have a role to play in deciding whether a specified factor that increases punishment for an offense is an element or sentencing enhancement factor. Perhaps that omission is attributable to the fact that there can be no doubt that Congress gave fair notice in the statutes at issue in those cases that the factor in question would result in enhanced punishment, and there is no settled doctrine in this Court that would apply lenity in determining "the required procedures for finding the facts that determine the maximum permissible punishment." *Jones*, 526 U.S. at 243 n.6. In any event, lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961); see also *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998); *United States* v. *Wells*, 519 U.S. 482, 499 (1997). The Court has "repeatedly stated that the rule of lenity applies only if, after seizing everything from aid can be derived, we can make no more than a guess as to what Congress intended." *Holloway* v. *United States*, 526 U.S. 1, 12 n.14 (1999) (internal punctuation omitted). No guesswork is required in order to find that Section 924(c)(1)'s machinegun clause was intended as a sentencing enhancement.

Torres, 523 U.S. at 238 (doctrine of doubt should help "maintain[] a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made"). This case would not be an appropriate one in which to address the constitutional issue, however, because petitioners have consistently argued only that Section 924(c) should be interpreted in their favor, not that it is unconstitutional as construed by both courts below in this case. See Pet. i; U.S. Br. in Opp. 18-20; Pet. Reply Br. 9 & n.9 ("Petitioners have from the beginning argued that weapon type is an element of the offense, and constitutional doubt is merely an interpretative doctrine, not a substantive ground of error."; "No need exists to consider whether § 924(c) is unconstitutional, for the Fifth Circuit's reading is hardly necessary.").

In any event, the constitutional question is squarely presented in *Apprendi* v. *New Jersey*, No. 99-478 (argued Mar. 28, 2000). If that case is resolved in favor of the State, there may be little or no remaining doubt about the constitutionality of the sentencing scheme at issue here. See *Almendarez-Torres*, 523 U.S. at 238 (doubt doctrine "is not designed to * * * creat[e] (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate"). If, alternatively, the Court decides *Apprendi* on grounds that sustain the statute at issue there, but leave some question about the constitutionality of treating firearm type as a sentencing factor under Section 924(c)(1), then the decision in this case should nonetheless be affirmed, for the reasons explained above.

If the Court were to resolve *Apprendi* against the State by adopting the broad constitutional prohibition

"suggest[ed]" in *Jones*, 526 U.S. at 243 n.6, then it would face two options in this case, under our reading of the statute. It could, under such a decision in *Apprendi*, declare that the sentencing enhancements that Congress has provided for uses of particularly dangerous firearms are facially invalid. Alternatively, the Court could determine that the enhancements may be applied only in accordance with procedures mandated in *Apprendi*, subject to standard principles of appellate review such as plain error and harmless error. The Court should, if it rules broadly against the State in *Apprendi*, adopt the latter course. Congress clearly intended to impose greater punishment on defendants whose offenses involved more dangerous weapons, and there is nothing to indicate that it would have refrained from providing those stiffer sentences if additional procedures were required. The course of preserving the availability of the type-of-weapon enhancements, subject to compliance with constitutionally mandated procedures, would, accordingly, be more consistent with Congress's intent than invalidating the enhancements outright.[27]

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[27] If the court in *Apprendi* were to adopt the rule suggested in *Jones*, it would presumably find the procedures mandated by the Constitution to be adequate notice of the possible enhancement, and proof of the predicate fact to the jury beyond a reasonable doubt. See *Jones*, 526 U.S. at 243 n.6 ("The constitutional safeguards that figure in our analysis concern * * * only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof."); *id.* at 252 n.11 ("The constitutional guarantees that prompt our interpretation bear solely on the procedures by which the facts that raise the possible penalty are to be found, that is, what notice must be given, who must find the facts, and what burden must be satisfied to demonstrate them."). *Jones* at times

Such a holding would mean that the 30-year sentences in this case resulted from constitutionally insufficient procedures—although, as we have noted, petitioners have never squarely raised a constitutional claim. In that unusual circumstance, the Court should remand this case to give the court of appeals the opportunity to consider the application of plain-error and harmless-error principles.[28]

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refers to whether the fact justifying enhancement is "charged in an indictment," which would be the usual way to provide the requisite "formal[] * * * notice" (*ibid.*) in a federal case. See, *e.g.*, *id.* at 243 n.6, 248. The constitutional rule proposed in *Jones*, however, was described as applying to state as well as federal prosecutions, and the Constitution does not require States to proceed by indictment. *Hurtado* v. *California*, 110 U.S. 516 (1884). Adoption of the *Jones* rule would not, accordingly, prohibit enhanced sentencing in a federal case solely because the indictment did not allege a necessary predicate fact, so long as the defendant received substantively adequate notice of the possible enhancement in some other way. Compare *Stirone* v. *United States*, 361 U.S. 212, 215-217 (1960) (where the right to indictment itself is at issue, a court may not permit the defendant to be tried on charges not actually preferred against him by the grand jury).

[28] If *Apprendi* makes clear that petitioners' present sentences resulted from constitutional error, then that error might well be "plain," after *Apprendi*, for purposes of a case like this one that is still pending on direct appeal. See *Johnson* v. *United States*, 520 U.S. 461, 467-468 (1997) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."). Given the evidence at trial, we doubt that petitioners could demonstrate that failure to treat firearm type as an offense element in this case has "affected substantial rights" or resulted in a "miscarriage of justice" that would "seriously affect the fairness, integrity or public reputation of judicial proceedings," as they would be required to do in order to benefit from a constitutional claim that they did not raise before the district court or the court of appeals (and, indeed, have not squarely raised even before this Court). See *United States* v. *Olano*, 507 U.S. 725, 734, 736 (1993); *Johnson*, 520 U.S. at 469-470; see also *Neder* v. *United States*, 527 U.S. 1, 8-20 (1999) (applying harmless error rule where court failed to charge jury on element of offense). Nonetheless, under the limited circumstances discussed in the text it would be appropriate for the Court to remand this case to the court of appeals to allow petitioners an opportunity to make the requisite showings to that court in the first instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. At the time of petitioners' offenses, 18 U.S.C. 924(c)(1) (Supp. V 1993) provided in pertinent part as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.

2. At the time of petitioners' offenses, 18 U.S.C. 921(a) (1988 & Supp. V 1993) provided in pertinent part as follows:

> (a) As used in this chapter [18 U.S.C. 921-930]—
>
> * * *

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches.

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term "short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified has an overall length of less than twenty-six inches.

* * *

(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

(24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

3. At the time of petitioners' offenses, Section 5845(b) of the National Firearms Act, as amended, 26 U.S.C. 5845(b) (1988), provided as follows:

(b) **Machinegun.**—The term "machinegun" means any weapon which shoots, is designed to

shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

4. As amended by Pub. L. No. 105-386, 112 Stat. 3469 (Nov. 13, 1998), Section 924(c)(1) now provides in pertinent part:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime —

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silence or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.